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No. 96-541

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

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In re THE HONORABLE THOMAS L. STEFFEN, Chief Justice, Nevada Supreme Court, and THE HONORABLE CHARLES E. SPRINGER, Associate Justice, Nevada Supreme Court,

*Petitioners.*

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## APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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**APPENDIX A**

[Filed Dec. 8, 1993]

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Case No. 24598

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IN RE PETITION FOR A WRIT OF PROHIBITION OR IN THE ALTERNATIVE FOR A WRIT OF MANDAMUS

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RESPONSE OF CHIEF JUSTICE ROSE TO MOTION TO DISQUALIFY HIM

COMES NOW, Justice Robert E. Rose, and sets forth his opposition to Judge Jerry Carr Whitehead's motion to disqualify him in this case. The basis of the response is that Chief Justice Rose feels no express or implied bias in favor or against either of the parties or their attorneys, and thus has a duty, pursuant to Nevada law, to resist attempts at disqualification. The grounds for disqualification cited by Judge Whitehead have no relationship to this case and are totally insufficient to state a claim for disqualification.

Judicial Conduct. Id. at 651, 653, 764 P.2d at 1300, 1303. Judge Whitehead participated in this decision as a district court judge.

Six months later, the Nevada Supreme Court reaffirmed the principles set forth in the Goldman decision when it decided Ainsworth v. Combined Insurance Co., 105 Nev. 237, 774 P.2d 1003 (1989). In that case, the Supreme Court had reinstated a punitive damages award of $6,000,000, and a petition for rehearing and a motion to disqualify former Chief Justice Elmer (Al) Gunderson were filed, based upon Gunderson's participation in the previous decisions in the case. Combined Insurance Co. asserted numerous facts that it claimed showed actual or implied bias or the appearance of bias or prejudice against Combined by Gunderson, including:

> 1. Gunderson openly ridiculed Combined's attorney in court, and referred to him as a "loser" or "losing lawyer" approximately 130 times in Gunderson's response to a motion to disqualify. See Response of E.M. Gunderson to Purported "Motions Belatedly Filed by Respondent" filed February 24, 1989.
>
> 2. Remarks by Gunderson at the hearing showed a clear animus toward Combined and the entire insurance industry. Ainsworth, 105 Nev. at 256, 774 P.2d at 1017.
>
> 3. Gunderson had considered extrajudicial, post-opinion material. Id. at 258, 774 P.2d at 1018.
>
> 4. Gunderson admitted to entering the case with a preconceived negative impression of Combined's counsel. Id.

5. The opposing attorney had acted as the campaign manager for Gunderson in one of his campaigns for the Nevada Supreme Court, and this attorney had also represented Gunderson's wife in a previous unrelated venture. Id. at 260, 261, 268, 774 P.2d at 1020, 1025.

6. In an unrelated case, attorney Laura FitzSimmons was representing Gunderson personally and had filed an amicus brief on behalf of the Nevada Trial Lawyers Association supporting Ainsworth and opposing Combined's position. Id. at 265, 266, 774 P.2d at 1023, 1024.

This is the same Laura FitzSimmons who now appears as one of the attorneys for Judge Whitehead.

In spite of these facts, the court held that the contentions were wholly insufficient to establish any disabling bias or a reasonable inference of impropriety. Id. at 269-270, 774 P.2d at 1026.

In the instant matter, the Clark County District Attorney found that Chief Justice Rose had committed no criminal acts, and the Attorney General concurred in that conclusion. Chief Justice Rose was aware of the pending charges against him less than two weeks prior to the Attorney General's decision, and the Attorney General's decision simply confirmed the District Attorney's action taken on a "no merit" case. If the facts established in the Goldman and Ainsworth cases were insufficient to establish any express or implied bias against Young, Steffen, or Gunderson, there are certainly insufficient facts in this case to infer any express or implied bias by Chief Justice Rose against Judge Whitehead or favoritism for the Commission.

The Nevada Supreme Court has also held that the attitude of a judge toward the attorney for a party is largely irrelevant. "Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party." Ainsworth, 105 Nev. at 259, 774 P.2d 22 at 1019. Judge Whitehead's attorneys claim that Chief Justice Rose owes some implied favor to the Attorney General, the attorney for the Commission on Judicial Discipline. But, following the clear language of Ainsworth, any perceived feelings toward or against a party's attorney generally is insufficient grounds for disqualification of a jurist. See also In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988). As stated in Dunleavy:

> In a small state such as Nevada with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary. Thus, allegations of bias based upon a judge's associations with counsel for a litigant pose a particularly onerous potential for impeding the dispensation of justice.

Id. at 790-91, 769 P.2d at 1275; see also Ainsworth v. Combined Insurance Co., 105 Nev. 237, 774 P.2d 1003 (1989). The Court also noted that if a litigant could successfully challenge a judge based upon such allegations of bias against counsel for the litigant, "it 'would bid fair to decimate the bench' and lawyers, once in a controversy with a judge, 'would-have a license under which the judge would serve at their will.'" Dunleavy, 104 Nev. at 790, 769 P.2d at 1275 (citing Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 1050 (5th Cir. 1975)); see also Ainsworth, 105 Nev. at 259, 774 P.2d at 1019. To permit a justice or judge to be disqualified on the basis of bias for or against a litigant's counsel would permit manipulation

of the court and significantly impede the judicial process and the administration of justice.

II

## THE MOTION TO DISQUALIFY FAILS TO MEET REQUIREMENTS OF RULE 35 OF THE NEVADA RULES OF APPELLATE PROCEDURE

Rule 35 of the Nevada Rules of Appellate Procedure was added in 1990 by this Court, and it provides more stringent requirements for the disqualification of a justice than existed when the Goldman and Ainsworth cases were decided. Specifically, the rule states that any motion to disqualify "must not claim or suggest ostensible facts that are neither established by proper averments in the supporting affidavits nor by the record of the case." See NRAP 35(a). Other than Chief Justice Rose's meeting with Rex Bell and the fact that the Attorney General concurred with the conclusion of the District Attorney that no criminal violation had been committed by Chief Justice Rose, the remaining "facts" asserted by Judge Whitehead are irrelevant or do not support a reasonable inference of favoritism toward the Attorney General's office.

Further, Rule 35 specifically states that once a justice has participated in a contested matter, he or she may be removed only for fraud or illegal conduct. "In no event will the supreme court deem timely any motion or charge seeking the disqualification or recusal of a justice who has heard argument upon, or otherwise considered, any contested matter in the cause, except as to grounds based on fraud or like illegal conduct of which the challenging party had no notice until after the contested matter was considered." NRAP 35(a). It is conceded by the Clark County District Attorney and the Attorney General that no violation of law was committed by Chief Justice Rose. Further, Judge Whitehead's attorneys concede as much

when they say that their motion for disqualification is based upon "appearances." See Motion to Disqualify Justice filed November 16, 1993, at 25. Chief Justice Rose signed the September 2, 1993, order that decided several contested matters and set oral argument on the case for October 4, 1993, in addition to other contested matters in which Chief Justice Rose has participated. Therefore, Judge Whitehead's motion to disqualify Chief Justice Rose is generally deficient because it presents no facts that establish actual bias or favoritism by Chief Justice Rose for or against any party, and specifically because it fails to set forth any facts that constitute fraud or illegal conduct by Chief Justice Rose after he has heard and decided a contested matter.

III

THE CHIEF JUSTICE IS GIVEN THE ADMINISTRATIVE AUTHORITY TO ASSIGN DISTRICT COURT JUDGES TO CASES THROUGHOUT NEVADA

The Nevada Constitution provides as follows:

> 1. The chief justice is the administrative head of the court system. Subject to such rules as the supreme court may adopt, the chief justice may:
>
> . . . .
>
> (b) Assign district judges to assist in other judicial districts or to specialized functions which may be established by law.

Nev. Const., art. 6 § 19. The chief justice is the administrative head of the Nevada court system and has the express authority to assign district judges to other judicial districts. When the chief justice makes such an assignment and a conflict of interest arises, he also has the inherent power to remove the district judge creating the conflict or

to appoint another district judge in his place and stead. The Nevada Supreme Court has recognized that the chief justice has the authority to administer the court system in Nevada, In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P.2d 1271 (1988); Goldman v. Bryan, 104 Nev. 644, 653-54, 764 P.2d 1296, 1302 (1988), and Chief Justice Rose did nothing more than that which he was authorized and had the responsibility to do.

Therefore, Chief Justice Rose respectfully requests that the motion to disqualify him in this case be denied. DATED this 8th day of December, 1993.

/s/ Robert E. Rose

## AFFIDAVIT OF ROBERT E. ROSE

STATE OF NEVADA)
: ss.
CARSON CITY )

COMES NOW, Robert E. Rose, and being duly sworn deposes and says:

1. In early 1992, District Court Judge Jerry Carr Whitehead requested that I write a letter of recommendation for him to support his effort to be appointed the next Federal District Court Judge in Nevada. I have known Judge Whitehead for twenty-five years and have always considered him a friend. On February 7, 1992, I wrote to Congresswoman Barbara Vucanovich recommending Judge Whitehead for that position. A true and correct copy of that letter is attached to this response. As can be seen from the letter, I hold District Judge Whitehead in very high regard and strongly recommended him for this position.

2. On November 8, 1993, I received a demand letter from Judge Whitehead's attorneys demanding I disqualify myself from his case because of a conversation I had with Clark County District Attorney Rex Bell concerning a former law clerk, Rhonda Mushkin, and the subsequent review of the matter by the Nevada Attorney General. This demand surprised me because of its harsh accusatory language from the attorneys representing someone I had always considered a friend.

3. I met with Rex Bell on or about December 9, 1992, and talked with him briefly about the search warrant executed at Rhonda Mushkin's home. Excerpts of that conversation have been reported, and I do not believe there is need for further elaboration at this time, except to say that I asked Rex Bell to do nothing improper, but in effect,

to do his job which he assured me he would. He has publicly indicated that he felt no undue influence or pressure from my inquiry.

4. Several weeks after my meeting with Rex Bell, I was contacted by detectives with the Las Vegas Metropolitan Police Department who wanted to talk to me about that meeting. I told them I would be glad to, and I met with them the next time I was in Las Vegas. At this interview with the detectives, I explained what I had said to Rex Bell as best I could recollect and why I was concerned about the case against Rhonda Mushkin. I had no idea at that time that my conversation with Rex Bell had been recorded. I told the detectives to contact me if they needed any additional information from me. They said they would.

5. I heard nothing about criminal charges being asserted against me by the Las Vegas Metropolitan Police Department until the very end of October or the beginning of November, 1993. On November 4, 1993, Jon Ralston informed me that the Las Vegas Metropolitan Police Department had claimed that I committed several violations of law subsequent to my meeting with Rex Bell, that the District Attorney's office had concluded that there was insufficient evidence to support any claim of criminal wrongdoing, and that the case had been sent to the Attorney General's office for review out of an abundance of caution. Jon Ralston's column concerning this matter appeared in the Las Vegas Review-Journal the next day, November 5, 1993.

6. On November 8, 1993, the Attorney General's office issued a letter agreeing with the District Attorney's office that I had committed no violation of the law. Although I was surprised that anyone was claiming that I had committed a violation of law, the action taken by the District Attorney's office and the Attorney General's office

was certainly what I expected, these claims of my violating the law having no merit. Therefore, I was aware of possible criminal charges being asserted against me for less than two weeks before the Attorney General's opinion. It is my understanding that the Attorney General's opinion concludes the matter and there is no further claim of violation of the law being made against me concerning the Rhonda Mushkin prosecution. I feel no favoritism toward nor animus against the Attorney General's office or its client, the Nevada Commission on Judicial Discipline. In my view, the Attorney General has been doing her job in reviewing the claims that I violated the law and also in representing the Nevada Commission on Judicial Discipline.

7. One of the attorneys for Judge Whitehead suggests in the motion to disqualify that the Mushkin matter and my participation in the Whitehead case is causing a serious crisis of public confidence in the integrity and independence of our judicial system. This allegation is too foolish for words. I would suggest, though, that the attorneys for Judge Whitehead are truly creating such a crisis by their "rambo-style" litigation practices, their "win at all costs" tactics, and their absolute refusal to recognize the legitimate authority of the Nevada Commission on Judicial Discipline given it by the Nevada Constitution and the people of Nevada. The integrity of the Nevada Commission on Judicial Discipline must be protected and its role in judicial discipline respected.

8. On August 24, 1993, I issued an order removing Judge Jerry Carr Whitehead from any further action in the Shearing v. Towbin case, which case Judge Whitehead had voluntarily assumed the month before while sitting as a visiting district court judge in Clark County, Nevada. I did this pursuant to the express power given to the chief justice by the Nevada Constitution as the administrative head of the Nevada court system and the power to assign district court judges to various cases throughout the state. The

facts giving rise to this order began when I, as chief justice, received a request from the Eighth Judicial District Court (Clark County) to assign Judge Jerry Carr Whitehead to hear a case entitled Fields v. Mosley. The order I signed assigning Judge Whitehead to this case also stated that he could handle "other matters as time permits."

9. It is the practice to ask a visiting district court judge to handle additional matters that cannot be handled by local judges because of conflicts of interests and the like, if time permits. I am informed and believe, and on information and belief state, that cases in addition to the Mosley matter were placed on the calendar for Judge Whitehead on July 15 and 16, 1993, including a case entitled Steven P. Shearing v. Daniel L. Towbin, Case No. A298149, the plaintiff being Dr. Steven Shearing, the husband of Justice Miriam Shearing. When sitting in Las Vegas on July 15 and 16, 1993, apparently Judge Whitehead did not realize that Dr. Steven Shearing was the husband of Justice Miriam Shearing and that his handling of that case might present a conflict of interest when he filed his confidential petition for a writ of mandamus one week later, which began the action in question on July 22, 1993. I am further informed and believe, and on information and belief state, that Judge Whitehead took no formal action in the Shearing case except to consider some preliminary motions and conduct a settlement conference.

10. When I received a document entitled "Request for Voluntary Recusal of Justice [Shearing], filed by one of Judge Whitehead's attorneys, I was alerted to this potential conflict created by Judge Whitehead's acting as the district judge in the Shearing case and then filing a petition with this Court where Dr. Shearing's wife sits as a justice. To eliminate any potential conflict, I removed Judge Whitehead from any further involvement or action on the Shearing case pending in district court. I did this because it is far easier to eliminate a conflict by removing a district court judge

and reassigning the case to another (there are forty-six district court judges in Nevada), rather than disqualifying a justice of this Court when there are only five in this state. Judge Whitehead could have recused himself from the Shearing case and removed the conflict of interest by his own action. He chose not to do that, but rather requested Justice Shearing remove herself.

It has been reported that Judge Whitehead abhors it when a peremptory challenge is lodged against him by parties, because he is of the belief that this is judge shopping, even though it is permitted by the rules of the Nevada Supreme Court. It is ironic that, in this case, the attorneys for Judge Whitehead attempted to remove Justice Shearing and are attempting to disqualify me, and thereby are doing essentially what their client abhors, judge shopping by attempting to remove the justices they perceive may not be persuaded by their arguments. True and correct copies of the orders involving the Fields v. Mosley and Shearing v. Towbin cases are attached to this response, these orders having been filed on June 28, 1993, and August 24, 1993, along with the "Request for Voluntary Recusal of Justice" filed by the attorneys for Judge Whitehead on August 23, 1993.

11. The Nevada Attorney General serves as the attorney for state governmental agencies and on many occasions serves as the attorney for the Nevada Supreme Court and its justices. The Attorney General has just concluded representing this Court and its justices in a suit filed by inmates who have received the death penalty claiming that our death penalty guidelines (Rule 250 of the Supreme Court Rules) are unconstitutional. In addition to this matter, the Attorney General represents the Court and justices on numerous other lawsuits by defendants and third parties. Therefore, I do not find it unusual that the Attorney General was designated by the Legislature to provide assistance and representation to the Nevada

Commission on Judicial Discipline. The Attorney General has served as the Commission's attorney without objection from this Court for the past five years when Justices Springer and Young have served as members of the Commission.

12. I have no bias or favoritism toward either of the parties in this case or their attorneys and deny any such alleged facts or inferences to the contrary. Feeling this way, I have no other alternative but to resist disqualification as required by Nevada law.

/s/ Robert E. Rose

Subscribed and Sworn to before me
this 8th day of December, 1993.

/s/ Vickie Roberts
Notary Public

## APPENDIX B

**FOR IMMEDIATE RELEASE** JANUARY 14, 1994

Chief Justice Bob Rose's Statement
Regarding the Judge Whitehead Case

"After intense consideration, I am voluntarily removing myself from the case involving Judge Jerry Whitehead and the Nevada Commission on Judicial Discipline in the hope to refocus the debate on the real issues in the case and to expedite a decision.

"This was a difficult decision, but it is in the best interests of the citizens who count on me. To keep faith with Nevadans as Chief Justice, I must ensure that justice is swift as well as sure. The legal maneuvering orchestrated by Judge Whitehead's battery of lawyers could have dragged the issue of my disqualification out for months--allowing Judge Whitehead to dodge the fair hearing the public has a right to expect. By stepping aside, this matter will be more quickly decided. The timely handling of cases is, itself, an important aspect of justice--particularly in cases involving public officials.

"Despite having been cleared of any wrongdoing by the Nevada Attorney General's Office and the Clark County District Attorney, I have been the object of attacks by the four attorneys Whitehead hired to defend him.

"This case is about getting to the bottom of very serious charges involving the misconduct of Judge Whitehead that has been presented to the Nevada Commission on Judicial Discipline by many complaints, including those filed by two fellow District Court Judges and the Washoe County District Attorney. Judge Whitehead claims the Commission has no authority to hear the complaints against him filed

with the Commission and has petitioned the Nevada Supreme Court to prevent the Commission's inquiry into his conduct and to dismiss the complaints against him. I want to return the focus to where it belongs--on the misconduct allegations pending against Judge Whitehead.

"By stepping aside in this case, the matter that is critical to the citizens of Washoe County will be more quickly decided. The timely handling of cases is, itself, an important part of justice--particularly in cases involving public officials.

"My philosophy has been that the Nevada Supreme Court should give great deference to the Nevada Commission on Judicial Discipline--a body added to the Nevada Constitution by the people of Nevada. While the Nevada Supreme Court has the authority to review preliminary orders of the Commission as well as its final result, any preliminary review should be done by this Court swiftly and with deference to the Commission. I regret that I will not be able to bring this philosophy to the final deliberations in this case.

"But, my participation in the Whitehead case is not essential. No judge is indispensable. What is essential is the proper functioning of the Nevada Commission on Judicial Discipline with each complaint decided promptly, impartially, and on the real issues presented.

"The motion to disqualify me does not state any ground for my disqualification. But, my voluntary recusal will make it possible for the Nevada Supreme Court to reach a final decision quickly and to refocus attention on the real issue--Judge Whitehead's misconduct and the legitimate authority of the Nevada Judicial Discipline Commission. These are the reasons why I am now voluntarily recusing myself from this case.

"I urge my fellow Justices to move as quickly as possible on this case."

**APPENDIX C**

[Filed March 15, 1996]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

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Case No. 27487

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NEVADA ATTORNEY GENERAL FRANKIE SUE DEL PAPA,

*Petitioner,*

vs.

THE HONORABLE THOMAS L. STEFFEN, Chief Justice of the Nevada Supreme Court, THE HONORABLE CHARLES E. SPRINGER, Justice of the Nevada Supreme Court, THE HONORABLE DAVID ZENOFF, Senior Justice of the Nevada Supreme Court, in their official capacities and HERBERT J. AHLSWEDE, in his official capacity as special investigator,

*Respondents.*

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ORDER

This case names two justices of this court as parties, Chief Justice Thomas Steffen and Justice Charles Springer. It was assumed by the undersigned that pursuant to Nevada law and the Nevada Code of Judicial Conduct that these two justices would acknowledge their automatic disqualification and voluntarily recuse themselves from this case. However, both justices have not recused themselves, and public statements have been made indicating that they do not consider themselves automatically disqualified.

To determine the basis for the claim that these two justices are not disqualified, the remaining three elected justices wrote to them. The response gave no clear answer to the question but asked a number of questions in response. See Correspondence File, Case No. 27847.

It is obvious that this case is not the same case as Whitehead v. Comm'n on Jud. Discipline, Docket No. 24598. Both the parties and the issues in the two cases are different. Further, it is equally obvious that pursuant to Nevada law and the Nevada Code of Judicial Conduct, Chief Justice Steffen and Justice Springer are statutorily disqualified from sitting or otherwise participating in this case. NRS 1.230(2)(a) states that:

> A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
>
> (a) When he is a party to or interested in the action or proceeding.

For the last 100 years, Nevada cases considering a statutory disqualification have held that any action taken by a judge who is disqualified by statute is void and invalid. Hoff v. District Court, 79 Nev. 108, 378 P.2d 977 (1963); Frevert v. Swift, 19 Nev. 363, 11 P. 273 (1886). It is beyond dispute that any action that could possibly be taken by Justices Steffen or Springer in this case would be invalid and void.

The Nevada Code of Judicial Conduct also disqualifies a justice who is a party in a case. Canon 3E(1)(d)(i) states that a judge shall disqualify himself when he "is a party to the proceeding . . . ." We recently held that court rules governing professional conduct have the force of law for those to whom they apply. See Shimrak v. Garcia-Mendoza, 112 Nev. ___, ___ P.2d ___ (Adv. Op. No. 35, March 5, 1996). By both Nevada law and the Nevada Code of

Judicial Conduct, Justices Steffen and Springer are automatically disqualified from participation in this case.

IT IS HEREBY ORDERED that Chief Justice Thomas Steffen and Justice Charles Springer are automatically disqualified from participation in this case pursuant to NRS 1.230(2)(a) and Nevada Code of Judicial Conduct Canon 3E(1)(d)(i) because of their status as named parties in the action. Any motions to disqualify any of the remaining justices or other issues the parties want to present to the court may be filed in this case and shall be determined in the ordinary course.

/s/ YOUNG, J.

/s/ SHEARING, J.

/s/ ROSE, J.